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In the

Supreme Court of the United States

October Term, 1972

No. 72-1645

RAYMOND PAUL GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No.

RAYMOND PAUL GREEN,

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v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Raymond Paul Green respectfully requests that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on March 13, 1973, by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit dated March 13, 1973 has not yet been reported. It is reprinted in the Appendix hereto, p. A. 1, *infra*.

On March 30, 1972, the United States District Court for the Middle District of Florida filed an unreported order and opinion, reprinted in the Appendix hereto, p. A. 15, *infra*.

JURISDICTION

On March 13, 1973, the Fifth Circuit entered a judgment affirming petitioner's conviction on charges of unlawful possession of 29 copper plates, with intent to use them to counterfeit United States obligations, in violation of 18 U.S.C. §474. On April 9, 1973, the Fifth Circuit entered an order denying a timely petition for rehearing. Both the judgment of affirmance and the order denying rehearing are reproduced in the Appendix hereto, p. A. 14, *infra*.

On timely application, Mr. Justice Powell on April 30, 1973, ordered that the time for filing this petition for certiorari be extended to and including June 8, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the action of an assistant city fire marshal, in uncovering counterfeiting contraband in the course of investigating the cause of a fire, constitutes a "plain view" justification for the failure of a federal Secret Service agent

to secure a search warrant prior to his being called to the scene to examine and seize the contraband, pursuant to the requirement of the Fourth Amendment.

2. Whether a federal Secret Service agent, who had ample opportunity to secure a search warrant before responding to a call from an assistant city fire marshal that suspicious copper plates had been found while investigating the cause of a fire, can rely upon the legitimate but warrantless investigation made by the fire marshal as justification under the Fourth Amendment for not securing a search warrant prior to the agent's seizure of the contraband.

3. Whether the Court of Appeals for the Fifth Circuit erred in finding that an assistant city fire marshal was also a state law enforcement official for purposes of the Fourth Amendment's "plain view" doctrine, a constitutional fact that is not supported by the record or by any finding or conclusion of the District Court.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Fifth Circuit has affirmed petitioner's conviction of unlawful possession of 29 copper plates, with the intent to use them to counterfeit obligations of the United States, in violation of 18 U.S.C. §474.

Prior to trial, the petitioner had moved to suppress all 29 plates on the ground that they had been illegally seized during an unlawful search of his apartment. After an evidentiary hearing, the trial court denied the motion to suppress. By stipulation, the case was tried without a jury. The petitioner was found guilty as charged and received a five-year suspended sentence. The Fifth Circuit affirmed both the conviction and the refusal to suppress the 29 copper plates.

The opinions of the courts below, reprinted in the Appendix hereto, fully set forth the facts relevant to petitioner's Fourth Amendment claim. In summary fashion, those facts are:

(1) During petitioner's absence, a small fire occurred in the kitchen of petitioner's apartment, in Jacksonville, Florida, on the afternoon of December 9, 1970. City firemen were called and quickly extinguished the blaze. Unable to determine the origin of the fire, the firemen requested the help of Harry Melzer, an assistant fire marshal of the City of Jacksonville whose principal duty was to investigate suspicious fires or fires of undetermined origin.

(2) Melzer himself testified that his occupation was that of an "Assistant fire marshal for the City of Jacksonville." Tr. App. 7. And the District Court correctly described him as "Assistant Deputy Fire Marshal." Appendix, p. A. 17, *infra*. There was no evidence, and the District Court

did not find, that in this capacity Melzer had any power of arrest or seizure or any other powers of a law enforcement officer.

(3) However, the Fifth Circuit's opinion refers to Melzer as being both "the Deputy Fire Chief and Deputy State Fire Marshal for the City of Jacksonville." Appendix, p. A. 2, *infra*. And it further refers to Melzer, in his asserted capacity as a deputy state fire marshal (a position now known as an "agent" of the State Department of Insurance) as possessing "broad powers to make arrests and seizures." Appendix, p. A. 9, *infra*. But there is no evidence of record that Melzer held any such state office or that he possessed any powers of a law enforcement officer. The Fifth Circuit's statements probably derive from erroneous and unsubstantiated references to that effect in the Government's brief (pp. 2, 17) in the Fifth Circuit.

(4) In any event, Melzer immediately responded to the call to come to petitioner's apartment. He arrived about 2 p.m. after the fire was out and while a number of firemen were still on the scene. Melzer had no arrest or search warrant with him; and he did not have petitioner's permission to enter or search the apartment.

(5) Melzer found that the fire had started in, and been confined to, a small cardboard box in the kitchen. He then searched the apartment for possible "hot spots" and, finding none, returned to the kitchen to examine the box with the aid of Fireman Lee. He later concluded that the fire had been caused by spontaneous combustion within the cardboard box.

(6) In the box, under some ashes and cloths, Melzer found a metal plate. Suspecting that the plate might have something to do with counterfeiting, Melzer phoned the

United States Secret Service and advised "that I found something in the fire or at this place that I thought needed them to investigate," but he did not say that he thought it was a counterfeit plate. Tr. App. 11, 21. Melzer described the copper plate, which had part of the impression of a $20 bill on it.

(7) Special Agent Varenholt of the Secret Service received Melzer's telephone call. At that point, Agent Varenholt was in his office in the Federal Building in Jacksonville, which was in the same building occupied by the United States District Judge. Varenholt discussed with his superior the advisability of getting a search warrant. But, for undisclosed reasons, such a warrant was not sought or obtained.[1] Varenholt conceded that no emergency was involved. Tr. App. 39.

(8) Varenholt proceeded to the apartment without any search or arrest warrant, arriving at about 2:30 p.m. He was invited to enter by Melzer, and did so for the sole purpose of examining the copper plate to see if it was suitable for counterfeiting. Varenholt entered the kitchen and examined the one copper plate that had been uncovered earlier. Fireman Lee and Melzer started sifting through the ashes and found additional plates. As each plate was found, Fireman Lee would hand it to Varenholt for examination; both Lee and Varenholt initialled each plate for evidentiary purposes. In all, 28 additional plates

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[1] The Fifth Circuit stated: "Whether this decision was based on the belief that they did not possess a sufficient description of the plates to obtain a warrant or on the belief that a warrant was unnecessary because the plates were already properly in the custody of a state officer is unclear." Appendix, pp. A. 3-A. 4, *infra*.

were recovered in this fashion, a process that covered 30 to 45 minutes. Varenholt took custody of all 29 plates.[2]

(9) Petitioner returned to his apartment while Melzer and Varenholt were examining the plates, but was refused admission. Petitioner later returned after the plates had all been examined. At this point, Varenholt attempted to interview the petitioner, after advising him of his rights. But the petitioner, having called his attorney, refused on counsel's advice to answer any questions. Varenholt advised petitioner that he had probable cause to arrest him; but an arrest was not made because petitioner's counsel assured Varenholt that he would have the petitioner in his office the next day.

(10) Varenholt left the apartment about 5 p.m., taking all 29 plates with him. Before leaving, Varenholt phoned his office to advise what "we found." At all times while Melzer and Varenholt were present in the apartment, and up to the time that Varenholt left with the plates, there were five or six firemen present.

(11) There never was any search warrant obtained for the apartment. Nor was any arrest warrant procured until Varenholt signed a complaint before a United States Commissioner against the petitioner, subsequent to the search and seizure of the plates.

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[2] The District Court found that Varenholt "stood by as an observer" while Melzer and the fireman searched the box and that "at no time did Agent Varenholt inaugurate or take part in the search of the above described box." Appendix, p. A. 18, *infra*. But Varenholt did receive and examine each copper plate uncovered by Melzer and the fireman.

(12) During the trial of the petitioner, the 29 copper plates removed from the apartment by Varenholt were received in evidence as the Government's Exhibit 1. The petitioner objected to the admission of such evidence on the ground that the plates were the products of an illegal search and seizure, in violation of his rights under the Fourth Amendment.

REASONS FOR GRANTING THE WRIT

The decision below presents several critical problems in the continuing evolution of the Fourth Amendment safeguard against unreasonable searches and seizures. In expressing its "real concern" with petitioner's claim that his constitutional rights had been violated by the seizure of the copper plates by the Secret Service agent, the District Court below observed that apparently there has never been "a case on all fours with the present case" and that "this precise area has never been examined or decided by any Supreme Court decisions." Appendix hereto, p. A. 17, *infra.*

1. THE ERRONEOUS FACTUAL PREMISE OF THE FIFTH CIRCUIT'S DECISION WARRANTS REVIEW BY THIS COURT.

Each case involving a claimed violation of the Fourth Amendment "must be judged on its own particular facts." *Lewis v. United States,* 385 U.S. 206, 212 (1966). But unless the particular facts are accurately reflected in the judicial assessment of a Fourth Amendment claim, the fundamental rights protected by that Amendment may be lost.

Here the Fifth Circuit has treated the factual circumstances as "a classic situation for application of the well established plain view doctrine." See Appendix, p. A. 9, *infra.* The "plain view" cases, as this Court explained in *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971), "have in common . . . [the fact] that the *police officer* in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." [Emphasis added]. Thus it became critical to the Fifth Circuit's invocation of the "plain view" doctrine in this case that the individual who inadvertently came across the contraband copper plates – Melzer, the assistant city fire marshal – also be a police or law enforcement officer, with power to make arrests and seizures.

The Fifth Circuit's opinion, borrowing from an unsubstantiated assertion in the Government's brief, seeks to invest Melzer with law enforcement status. But the record simply does not permit or justify such a description of Melzer's functions. He described himself as an assistant city fire marshal with power to investigate the causes of fires; he claimed no appointment as a state law enforcement officer and he claimed no possession of the power to arrest or seize. Nor was there any other testimony or documentation indicating his right to claim the status of a law enforcement officer. Moreover, the District Court's extensive opinion and findings of fact nowhere describe or treat Melzer as other than an assistant city fire marshal, his power being solely that of investigating suspicious fires and their causes.

A precise and accurate description of Melzer's status becomes a constitutional fact, for upon that fact rests the propriety of invoking the "plain view" doctrine. This

Court may properly review an appellate court finding of such a fact, especially one that appears to be so clearly erroneous. Unless the Fifth Circuit's finding is so reviewed and corrected, the Fourth Amendment rights of this petitioner may be lost and the "plain view" doctrine may be perverted upon the altar of a false factual premise.

2. THE DECISION BELOW REPRESENTS AN UNWARRANTED AND DANGEROUS EXTENSION OF THE "PLAIN VIEW" DOCTRINE.

Assuming, as we must, that Melzer, the assistant city fire marshal, possessed only investigatory powers respecting the causes of fires, the decision below constitutes a unique and highly questionable application of the "plain view" doctrine. The decision stands as an invitation to other courts to apply the doctrine in situations never before contemplated by this Court.

This Court's summary of the doctrine in *Coolidge v. New Hampshire*, 403 U.S. at 464-471, demonstrates that the initial intrusion that precedes the discovery of something in plain view must not only have been justifiable but must have been conducted by police or law enforcement officers. That must be so, for "the initial intrusion that brings the police within plain view of such an article" must be supported by a warrant or "by one of the recognized exceptions to the warrant requirement." *Coolidge*, 403 U.S. at 465. And the exceptions to the warrant requirement can only be in terms of such police activity as "hot pursuit" of a fleeing suspect (*Warden v. Hayden*, 387 U.S. 294 (1967)), a search incident to an arrest (*Chimel v. California*, 395 U.S. 752 (1969)), or protection of articles in

police custody (*Harris v. United States*, 390 U.S. 234 (1968)). In all such instances, the initial intruders must be able to justify their failure to obtain and execute a particularized search warrant. Obviously, such a justification cannot be offered by those who have no authority to obtain or execute a warrant in the first instance.

Yet the Fifth Circuit's opinion appears to extend the "plain view" doctrine to anyone other than a policeman who has lawfully and for any reason entered upon the premises of another. Indeed, it is possible to read the opinion as so holding without reference to the erroneous assumption that Melzer was a law enforcement officer. Application of the "plain view" doctrine was said to be permissible because "Melzer was lawfully present in Green's apartment for the purpose of investigating the cause of the fire" and, although without a warrant, Melzer's "presence was justified by the emergency created by the fire which required prompt action to ensure the safety of the building and of its occupants." See Appendix hereto, p. A. 9, *infra*. Thus the Fifth Circuit's basic justification for Melzer's initial intrusion into petitioner's apartment appears to be constructed out of Melzer's function in investigating the cause of the fire, rather than out of any law enforcement function he may or may not have possessed.

An intrusion for purposes of investigating a fire, of course, needs no warrant. Cf. *Wyman v. James*, 400 U.S. 309 (1971), holding that home visitation in welfare cases is free of any Fourth Amendment restrictions. Hence Melzer's entry into petitioner's apartment needed no justification in terms of an exception to the warrant requirement. But that very fact appears to render the "plain view" doctrine totally inapplicable. As already indicated, the doctrine assumes that the initial intruder must justify

his entrance either by producing a warrant or an excuse for not obtaining one.

Under the Fifth Circuit's approach, any kind of person who lawfully enters one's premises without a warrant can activate the "plain view" doctrine. Such a person could be a fireman, a fire marshal, a repairman, a plumber, a meter reader, a welfare inspector, or even a chance friend or acquaintance. Once lawfully upon the premises, whether invited or not, such a person would be free to look about for contraband or other suspicious articles in plain view, call the police to enter the premises without a warrant, and then sit by while the police catalogue and seize the suspicious articles. But little would then be left of the Fourth Amendment's protection against warrantless intrusions of one's home by law enforcement officers. An easy technique for police evasion of the warrant requirement would have been created.

This Court's review powers must be invoked before so drastic a revision of the Fourth Amendment's "plain view" doctrine becomes engrained in our federal jurisprudence.

3. THE FIFTH CIRCUIT'S DECISION CREATES AN IMPORTANT PROBLEM AS TO THE NECESSITY FOR A FEDERAL LAW ENFORCEMENT OFFICIAL OBTAINING A SEARCH WARRANT BEFORE SEIZING CONTRABAND UNCOVERED BY THOSE INVESTIGATING THE CAUSE OF A FIRE.

The ultimate holding of the Fifth Circuit is that, since Melzer the fire marshal had lawfully entered the apartment and found the copper plates in full view while investigating the cause of the fire, the Secret Service agent Varenholt "cannot be constitutionally tripped up at the threshold

that he stepped across to make his confirmation and to take custody of the plates from Melzer." Appendix hereto, p. A. 11, *infra*. In other words, any obligation Varenholt may have had to obtain a search warrant was excused by the fact that "Varenholt opened no doors and examined only the evidence given him by fireman Lee and marshal Melzer." *Ibid.*

Such a ruling would appear to conflict with the teaching of *Lustig v. United States*, 338 U.S. 74 (1949). The Court there dealt with a factual situation highly similar to the instant one, a Secret Service agent having responded to a local police call and viewed and seized counterfeiting contraband that had earlier been found by the police as the result of an illegal search. It was held that the rather limited activity of the federal agent did not insulate him from the illegality of the police search. In the words of the prevailing opinion, 338 U.S. at 79, "So long as . . . [the federal agent] was in it before the object of the search was completely accomplished, he must be deemed to have participated in it. Where there is participation on the part of federal officers it is not necessary to consider what would be the result if the search had been conducted entirely by State officers." See also *Elkins v. United States*, 364 U.S. 206 (1960), abolishing the "silver platter" doctrine.

Hence Varenholt, the Secret Service agent in this case, received no Fourth Amendment immunity bath by virtue of doing no more than confirming the suspicions of Melzer, the assistant city fire marshal. The fact that Varenholt opened no doors and looked at and seized only the evidence handed to him by Melzer did not *per se* excuse him from obtaining a search warrant. His obligation to obtain a warrant, or his excuse for not obtaining one, must be

assessed in terms of all the activities of the firemen and of Varenholt himself. Under the Fourth Amendment, Varenholt is accountable for all the circumstances surrounding the seizure of the copper plates.

The critical circumstance in this situation was the sharp distinction between (1) the fire and the start of the investigation as to its cause, and (2) the uncovering of the contraband during the course of that investigation. The plates were discovered by Melzer after the small fire had been extinguished; the emergency had ended. And upon the unveiling of the first plate, all investigatory activity came to a halt while Melzer called the Secret Service office to report his suspicion and to request its services. At that point, what were the constitutionally permissible choices confronting Varenholt?

(1) Varenholt could have and should have secured a judicial warrant authorizing him to search and seize any counterfeiting contraband found in petitioner's apartment, a warrant based on probable cause supplied by Melzer's call. This possibility did occur to Varenholt and he discussed it with his superior. Yet for reasons unknown, they did not step a few doors down the hall to the federal judge's chambers to obtain such a warrant; even the Fifth Circuit could not understand such a failure to observe the basic procedural requirement of the Fourth Amendment.

Thus is raised in sharp form a question that has long plagued this Court. Where the law enforcement officers have advance knowledge of the existence and location of suspicious articles, where they intend to seize them if the articles are in some way contraband, and where there is ample opportunity for the officers to obtain a warrant,

can there be any recognizable excuse for failing to obtain a warrant? The Court in *Trupiano v. United States*, 334 U.S. 699 (1948), gave an unqualifiedly negative answer to that question. *Trupiano*, of course, was qualifiedly overruled in *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), to the extent that the practicability of obtaining a search warrant had been crystallized by *Trupiano* into the *sine qua non* to the reasonableness of a search. But in *Coolidge v. New Hampshire*, 403 U.S. 443, 482 (1971), while not reinstating *Trupiano* and "all its implications," this Court indicated that a search warrant must be sought in the absence of "exigent circumstances." This case presents an opportunity to examine further into the concept of "exigent circumstances" as it relates to the *per se* unreasonableness of warrantless searches. What possible "exigent circumstance" existed here that justified Varenholt's failure to secure a search warrant?[3]

(2) Varenholt's second choice, and the one that he selected, was to do nothing by way of obtaining a search warrant and to rely on the possibility that the fire marshal's activities and authority would somehow fill the breach. But the assistant city fire marshal's search was permissible, if at all, under the "plain view" doctrine of the Fourth Amendment and, as has been seen, it is highly unlikely that Melzer was qualified to invoke that doctrine. Varenholt could thus absorb no legitimacy from the fire marshal's prior warrantless search. On Varenholt alone

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[3] It should also be noted that at no time was there any danger that the contraband plates might be removed from the apartment before Varenholt could secure a warrant and execute it. The entire search and seizure covered about two and a half hours. Melzer and five other firemen were present at all times; petitioner was absent.

fell the duty of either obtaining a search warrant or explaining why he did not secure one. The record is barren of any "exigent circumstance" suggesting such an excuse.

(3) If Varenholt had any thought of relying on the contraband nature of the copper plates uncovered by the assistant fire marshal, as an excuse for not securing a search warrant, it was disabused by this Court's statement in *Coolidge*, 403 U.S. at 442, that "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrentless search."

The Fifth Circuit has said that once the privacy of a dwelling has been "lawfully invaded" by a state officer it would be "senseless" "to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband." Appendix hereto, p. A. 12, *infra*. In reply, it need only be said that where the state officer's invasion is legitimate for reasons entirely unrelated to Fourth Amendment concepts and where the federal officer can offer no independent "exigent circumstances" justifying his failure to obtain a warrant, it would be "senseless" to abandon the basic constitutional rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967).

CONCLUSION

For these various reasons, certiorari should be granted to review the judgment and opinion of the Fifth Circuit in this proceeding.

Respectfully submitted,

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1908

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RAYMOND PAUL GREEN,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(March 13, 1973)

Before GODBOLD, DYER and CLARK, Circuit Judges.

DYER, Circuit Judge: Green appeals his conviction of unlawful possession of twenty-nine copper plates made in the similitude of a plate from which genuine obligations and securities of the United States are printed, with the intent to use the plates to counterfeit obligations of the United States, or any part thereof, in violation of 18 U.S.C.A. § 474. Prior to trial, Green moved to suppress all twenty-nine plates, on the grounds that they were illegally seized during an

unlawful search of his apartment. After hearing evidence on this issue, the trial court denied the motion. Green and the government then stipulated to waive a jury trial, and the case was tried before the district court judge. Green was found guilty as charged and received a five year suspended sentence. We affirm.

In the early afternoon of December 9, 1970, while Green was away, a fire broke out in his apartment on the ground floor of an apartment building in Jacksonville, Florida. Two fire trucks and a number of Jacksonville firemen responded to the alarm. Unable to determine the origin of the blaze, the Fire Chief requested the help of Henry Melzer, the Deputy Fire Chief and Deputy State Fire Marshal for the City of Jacksonville,[1] whose principal duty was to investigate suspicious fires or fires of undetermined origin.

By the time Melzer arrived at the scene, the fire had been suppressed. No one occupying the apartment was present, and at this time the occupant's identity was unknown. Melzer began examining the scene, to determine the cause of the fire, which had been confined to the kitchen. Some of the woodwork was smudged, but the principal damage was to a paste-

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[1]In a technical sense, the State of Florida has not had any Deputy Fire Marshals since 1969, when, in a comprehensive revision of the State Code, the Florida legislature transferred fire prevention duties from the State Treasurer to the newly created Department of Insurance and abolished the title "Deputy Fire Marshal." "Deputies" thenceforth became known as "agents" of the Department of Insurance but retained all the powers and duties of their former offices, Fla. Laws 1969, ch. 69-106, and Chiefs of fire departments are ex officio agents of the State Fire Marshal. Fla. Stat. Ann. § 633.121.

board box on the floor that had been virtually reduced to ashes. Melzer briefly inspected the box and then made a tour of the apartment, looking for "hot spots" or other areas in the apartment that might be afire.

After determining there were no other danger areas, Melzer returned to the kitchen to examine the box in which the fire seemed to have started in order to determine its cause. His procedure was to have a fireman remove each item in turn from the ashes for Melzer's inspection. While engaged in this duty, fireman Lee discovered several metal plates and called Melzer's attention to them. As one of the plates was removed others similar to it were disclosed underneath. The plate was some six to eight inches long and four inches wide, and Melzer noticed the image of a $20 Federal Reserve Note on it. Although Melzer was not an expert on counterfeiting, he had on previous occasions worked in cooperation with the Secret Service and was immediately able to tell that the plate was probably a counterfeiting plate. Wanting to alert the appropriate investigative agency, he called Secret Service Agent Varenholt. Melzer described the plate to Varenholt over the telephone and furnished him the address of the apartment.

Before going to the apartment to examine the plates, Varenholt discussed the matter with his superior, and they determined not to seek a warrant for seizure of the plates. Whether this decision was based on the belief that they did not possess a sufficient description of the plates to obtain a warrant or on the belief that a warrant was unnecessary because the plates were

already properly in the custody of a State officer is unclear.

When Varenholt arrived at the apartment, the firemen and trucks were still on the scene. One of the firemen let him into the apartment. Entering the kitchen, Varenholt observed that several firemen were sifting through a large pile of ashes on the floor and placing them in a tub. Melzer handed Varenholt the plate that had already been removed from the ashes, and Varenholt determined on the basis of a quick inspection that it was capable of printing a counterfeit impression. After Varenholt had examined the first plate, the remaining twenty-eight plates were handed to him one by one, each being initialed first by fireman Lee as he removed it from the ashes and then initialed again by Varenholt as he received it. In addition, a partial impression of the face of a $20 Federal Reserve Note was found amongst the plates.

After Varenholt had completed his examination of the twenty-nine plates, he waited for the tenant to return to the apartment. Green had previously come to the apartment, just after Melzer had called Varenholt, but he was told by a fireman at the door that he could not enter while firemen were inside, and he departed. After Varenholt had taken custody of the plates, and while he was waiting for the occupant of the apartment to arrive, Melzer completed his investigation. He concluded that the fire was a result of spontaneous combustion, caused by a chemical reaction between the metal of the copper printing plates, some rags that had been in the box, and possibly cleaning fluid that may have been placed on the plates to preserve them.

After Varenholt had waited in the kitchen for a short while, Green returned to the apartment. Varenholt advised him of his rights, and Green made a telephone call to his attorney. Varenholt informed Green that he had probable cause to arrest him; however, because Green's attorney assured Varenholt that Green would surrender himself on the following morning, Varenholt did not arrest him at that time.

Green's argument on appeal is two-fold. First, he contends that the twenty-nine plates should have been excluded from evidence because they were the product of a warrantless invasion of his apartment in violation of the Fourth Amendment. Additionally, he claims that the evidence was insufficient to prove that he had the requisite statutory intent to use the plates found in his apartment for counterfeiting. We disagree.

THE SEARCH OF GREEN'S APARTMENT AND THE SEIZURE OF THE COUNTERFEITING PLATES

The essential Fourth Amendment issues before this Court are (1) whether the initial warrantless intrusion by the firemen and Melzer was justified; (2) if so, whether the discovery and seizure of the plates were accomplished by actions within the limited scope of the justification for the initial intrusion; and (3) if so, whether a federal officer, who is expert in identification of the type of suspected contraband discovered, must himself secure a warrant before he may enter the premises to confirm that the plates are contraband and to take custody of them when the plates are

already legitimately in the possession of a State officer.

The fundamental facts determinative of the validity of the initial entry may be succinctly stated. Firemen entered an empty apartment in a multi-unit apartment building to extinguish a fire and called the Deputy Fire Marshal when they, including the Fire Chief, could not determine its cause. Although Green concedes that an existing fire in an apartment building is an emergency of sufficient proportions to permit the prompt and warrantless entry of firemen to suppress it, he would require that Melzer have obtained a warrant before he entered to investigate the cause of the fire.

The Supreme Court has had occasion to consider a question peripherally related to this in *Camara v. Municipal Court*, 1967, 387 U.S. 523, and in *See v. Seattle*, 1967, 387 U.S. 541. Both cases involved the recurring issue of routine area inspections conducted in the interest of enforcing compliance with municipal building and fire safety codes without warrants. The Court concluded that such inspections were reasonable and consistent with legitimate governmental interest in the protection of the health and safety of the public, but required that any inspection of a particular premises as a part of such a routine area inspection be supported by a search warrant. However, the Court expressly limited this warrant requirement to the *routine and general inspection of an entire area* for the purpose of insuring general compliance with the safety codes involved — *i.e.*, in situations where no compelling reason exists necessitating the prompt inspection of a particular premises at a particular time.

> Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U.S. 11 (compulsory small pox vaccination); *Compagnie Francaise v. Board of Health*, 186 U.S. 380 (health quarantine); *Kroplin v. Truax*, 119 Ohio St. 610, 165 N.E. 498 (summary destruction of tubercular cattle). On the other hand, in the case of most routine area inspections, there is no compelling urgency to inspect at a particular time or on a particular day. . . .

Camara v. Municipal Court, 1967, 387 U.S. 523, 539.

Unlike the area inspection, which does not focus on a particular premises and is conducted without reference to knowledge of a fire hazard at a given location, the investigation of an actual fire is logically and factually inseparable from the fireman's job of suppressing the blaze. The ordinary fireman is not an expert in the cause of fires. He cannot determine, after he douses the blaze, whether the danger is past or merely hidden, awaiting only a fresh supply of oxygen to set it off again with perhaps disastrous results.

A fire might have been caused by any of a myriad of conditions that would not be terminated by simply putting out the flame — *e.g., a faulty* appliance, defec-

tive or worn out electrical wiring, or careless storage of flamable materials. Where the existence of a gravely dangerous condition has already manifested itself in one fire, it would be the height of folly for the firemen to enter, suppress the flames, and leave the premises without assurance that they would not be required to return, perhaps within minutes, to do it all again.

Critical to the Supreme Court's imposition of the warrant requirement in *Camara* and in *See* was the recognition that there is nothing in the nature of a routine area inspection that requires immediate entry into a particular structure in the area at a specific time. There is, however, such a necessity in the case of a fire. Until someone expert in the cause of fires arrives, inspects the scene, and determines that the fire has been completely extinguished, the firemen cannot reasonably depart. The imposition of a warrant requirement in such circumstances would immobilize the entire apparatus of fire protection. The absurdity of requiring the fire investigator to secure a warrant in order to search for the fire's cause is self evident.

In the case *sub judice* the district court correctly observed that "[a]scertaining the cause of the fire was necessary to assure that it was in fact totally extinguished and would not reoccur." In short, Melzer's entry was entirely reasonable and his search of the apartment necessitated by the exigencies of the circumstances. Clearly, this is not the type of investigation dealt with in *Camara* and *See* and, therefore, is not subject to the rule of those cases.

The facts of the case *sub judice* present a classic situation for application of the well established plain view doctrine. Melzer was lawfully present in Green's apartment for the purpose of investigating the cause of the fire. Although without a warrant, his presence was justified by the emergency created by the fire which required prompt action to ensure the safety of the building and of its occupants. The plates seized were unexpectedly uncovered during Melzer's examination of the box where the fire had apparently started — a course of action distinctly within the scope of the justification for his presence in the first instance. Finally, upon removal of the first plate from the ashes, with the consequent exposure of the others underneath, it was immediately apparent to Melzer that the plates were evidence of the cause of the fire, and his initial judgment was that the plates were for counterfeiting. *See Coolidge v. New Hampshire*, 1971, 403 U.S. 443, 466-71; *cf. United States v. Allen*, 5 Cir. 1973, ____ F.2d ____ [No. 72-2084, January 5, 1973]; *United States v. West*, 5 Cir. 1972, 460 F.2d 374.

Contrary to Green's suggestion, the Fourth Amendment does not require that Melzer have halted his investigation once the first counterfeiting plate was uncovered and have obtained a search warrant before continuing. The activity that led to the discovery of the plates was within the scope of the justification for Melzer's intrusion. Although Melzer, as we read the Florida law, had broad powers as a law enforcement officer to make arrests and seizures,[2] his conduct in

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[2]Fla. Stat. Ann. § 633.14 provides:

Agents of the state fire marshal shall have the same

uncovering and seizing the plates did not exceed the necessary investigative procedures required for him to fulfill his duty as a fire marshall[3] and to accomplish the limited purpose of determining the cause of the fire. Melzer's procedures did not vary from the ordinary and necessary actions of the fire department in such emergencies. In the course of his investigation, it was incumbent upon him to sift the ashes of the box in which it was evident that the fire had been concentrated. In performing his duties as fire marshal, Melzer inadvertently found the metal plates which he determined had partially contributed to causing the fire. Unfortunately for Green, the plates also happened to be contraband.

Nor was it necessary for Secret Service Agent Varenholt to have obtained a warrant before he entered the apartment to confirm that the plates were of such quality as to be suitable for printing counterfeit obligations and to take custody of them. As explained above, the apartment had already been lawfully entered

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authority to serve summonses, make arrests, carry firearms and make searches and seizures, as the sheriff or his deputies, in the respective counties where such investigations, hearings, or inspections may be held; and affidavits necessary to authorize any such arrests, searches or seizures may be made before any magistrate having authority under the law to issue appropriate processes.

[3]Fla. Stat. Ann. § 633.03 provides:

The state fire marshal shall investigate the cause, origin, and circumstances of every fire occurring in this state wherein property has been damaged or destroyed where there is probable cause to believe that the fire was the result of carelessness or design. Report of all such investigations shall be made on approved forms to be furnished by the fire marshal.

and searched. Once Melzer unexpectedly came upon the contraband, he had the authority as a law enforcement officer to seize it. Moreover, he had the *duty* as a fire marshal to seize all evidence relevant to his investigation of the fire's cause. Melzer certainly could have carried the plates to the fire station and sent them to the State crime laboratory or to the F.B.I. for chemical analysis. Likewise, he surely could have removed the plates and carried them to the Secret Service's headquarters, or have handed them to Varenholt outside of the apartment. Thus, Varenholt cannot be constitutionally tripped up at the threshold that he stepped across to make his confirmation and to take custody of the plates from Melzer.

The evidence is uncontroverted that this is all that Varenholt did. His conduct inside of the apartment demonstrates that he recognized and accepted the limited mission for which he was legitimately present. Varenholt never left the kitchen area, except once to use the telephone. The situation presented numerous unanswered questions to which a general exploratory search may have provided answers. Nevertheless, Varenholt opened no doors and examined only the evidence given him by fireman Lee and marshal Melzer.

The purpose of a search warrant is to ensure judicial authorization, in advance, of intrusions into constitutionally protected privacy. Where a lawful intrusion has already occurred and a seizure by a State officer has validly taken place as a result of that intrusion, the invasion of privacy is not increased by an additional officer, albeit a federal officer, who is expert

in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence. Once the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized. *Terry v. Ohio*, 1968, 392 U.S. 1; *Harris v. United States*, 1968, 390 U.S. 234. The apparent conflict between the Constitution and common sense which the plain view doctrine has reconciled is the same misconception which we here seek to dispel. *See Mapp v. Ohio*, 1961, 367 U.S. 643, 647.

THE EVIDENCE OF UNLAWFUL INTENT

Green also argues that there was no substantial evidence that he had the unlawful intent to use the plates found in his apartment for counterfeiting. We find this contention frivolous. Green completely ignores the fact that a partial impression of the face of a $20 Federal Reserve Note was found amongst the plates. Additionally, 18 U.S.C.A. § 474 only requires that one have the intent to use the plates to counterfeit "*any part*" of an obligation or security of the United States. While this evidence is circumstantial, by its very nature evidence of intent is virtually always circumstantial.

Moreover, a careful review of the record convinces us that the evidence was more than sufficient to justify and support the district court's guilty verdict.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

[Filed April 18, 1973]

* * * * *

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[Filed April 9, 1973]

* * * * *

ON PETITION FOR REHEARING

Before GODBOLD, DYER and CLARK,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

[Filed March 30, 1972]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

* * * *

ORDER

(Number and Title Omitted)

This case was originally heard on Friday, March 24, 1972 on a Motion to Suppress Evidence (counterfeit copper plates) seized by the United States Secret Service. After a full evidentiary hearing the Court reserved judgment and continued the case until Tuesday, March 28, 1972 at which time the Court denied the Motion for Suppression. Upon the filing of a waiver of jury trial the Court proceeded to hear the evidence, part of which by stipulation covered the evidence heard at the suppression hearing on Friday, March 24, 1972. When the Government rested its case the defendant moved for judgment of acquittal which the Court denied. The defendant then rested and renewed his Motion for Judgment of Acquittal under Criminal Rules of Procedure 29(b). The Court reserved judgment on this Motion and the matter is now before the Court for disposition.

The Court upon the entire record has no hesitation in stating that the proof of the Government reveals possession by the defendant of copper plates which could be used in the manufacturer of $20 Federal Reserve Notes. The evidence disclosed that the defendant rented the

unfurnished apartment where the plates were found, many months before the finding of the plates. So far as the owner knew he was the sole occupant but having never visited the apartment, after having leased it to the defendant, she was unable to state of her own knowledge whether or not he had actually other people living in the two bedroom apartment. She testified it was no concern of hers because the rental would have been the same whether there was sole occupancy or multiple occupancy.

The evidence conclusively demonstrated to the satisfaction of the Court that one fingerprint of the defendant was found on one of the 28 copper plates involved which plate had been used to make a partial print out of a $20 bill. The plates examined by the Secret Service indicated that they were intended to reproduce Federal Reserve Notes and the seals of some five or six different Federal Reserve Banks were included among the 28 plates seized. Defendant, through his counsel argues that there was no showing of the necessary intent to use the plates in the manufacture of counterfeit notes. As stated above, the Court by drawing inferences from undisputed established facts has no difficulty in concluding that the possession was coupled with the intent at the appropriate time to reproduce and counterfeit United States Currency, to-wit: $20 Federal Reserve Notes. In fairness to the defendant the evidence also discloses that the plates in question would reproduce only one side of a $20 bill and no plates which would or could reproduce the back side of such a $20 bill were found.

What has given the Court real concern is the question as to whether the defendant's constitutional rights were

violated in the seizure of the plates by the Secret Service Agent. The defendant based his Motion for Suppression upon a claim of violation of his rights under the Fourth and Fourteenth Amendment. He also based his Motion for Judgment of Acquittal at the conclusion of all the testimony on violation of defendant's rights under the Fourth and Fourteenth Amendment to the Constitution of the United States as well as lack of proof of intent on his part. Despite the hundreds of cases dealing with illegal searches and seizures the Court's research and counsel for defendant's research has not revealed a case on all fours with the present case and Corpus Juris Secumdum in its discussion of such searches and seizures observes that this precise area has never been examined or decided by any Supreme Court decisions.

The facts of the case, while apparently simple, have raised many legal questions. On December 10, 1970, in answer to an alarm, firemen were summond to the first floor apartment at 1723 San Marco Boulevard occupied by the defendant. Upon receiving notice of the blaze, Assistant Deputy Fire Marshal Melzer, in the course of his duties, immediately went to the scene in order to fulfill his obligations to determine the cause of the fire and to determine whether or not it came from causes other than intentional incendiary acts (arson).

When he arrived, the fire had been put out although pieces of equipment were at the scene and several firemen were in the apartment. The fire had originated in a cardboard container described as about 18 inches square and 8 to 10 inches in height. In this box were burnt papers, scorched rags and ashes. The box in the kitchen area and the blaze was there confined. Fire Marshall Melzer,

together with Fireman Green, began to sift the ashes. At that time he had not determined the cause of fire. Almost immediately the firemen came upon a metal copper plate which, upon examination by Marshal Melzer, appeared to be a counterfeit copper plate which might be used to duplicate United States Currency. Suspending operations, he went to the telephone on the premises and, having worked for some 28 years with the State and Government Officials, he properly called the agency whose duty it is to protect the currency of the United States, namely, the Secret Service. He reached Special Agent Varenholt and informed him of his discovery, telling him he had something that might interest him and described his find. He asked Agent Varenholt to please immediately come to the scene to determine whether or not it was actual contraband.

Agent Varenholt immediately went to the location and at the specific invitation of Marshal Melzer, was escorted into the kitchen. He was shown the one plate uncovered up to that point, identifyed it as contraband and stood by as an observer while Fireman Green and Marshal Melzer continued the search for the cause of the fire in the carton uncovering some 28 copper plates and the one partial duplication of a plate above referred to. These at the time were dirty, full of ashes and Agent Varenholt at no time took part in any search merely observing the acts of the local fire department and fire marshal until the box had been emptied of its contents. At the time there were many burnt rags, burnt papers and ashes. Agent Varenholt having determined that they were counterfeit copper plates and contraband, was given the plates by Marshal Melzer and took them into his possession. It is important to note that at this point and

the Court so finds that at no time did Agent Varenholt inaugurate or take part in the search of the above described box.

After further examination of the premises, Fire Marshal Melzer made a determination after the search was over that the origin of the fire was spontaneous combusion in the box caused by a combination of metal, cloth and chemical substances which he could not and did not identify. After the fact he could determine no suspicious odor such as lighter fluid, gas or any other inflammable liquid. The occupant of the premises, identified by the landlady in court as the person to whom she had rented the apartment, appeared some 10 minutes after the conclusion of the search. Agent Varenholt who had later been joined by an additional Secret Service Agent advised the defendant of his rights. After calling his attorney, defendant declined to make any statement and his attorney arranged on the telephone with the Secret Service Agent to surrender him the next morning at the Magistrate's Office in the Jacksonville United States Court House. This was accomplished. Defendant, through counsel contends that disposition of this case is governed by the law in *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 (1971), and *Lustig v. U.S.*, 338 U.S. 74, 69 S.Ct. 1372 (1949), a New Jersey case and that the Court should even at this point, hold that the search was illegal and violated defendant's constitutional rights. This Court finds to the contrary.

The case of *Coolidge v. New Hampshire* can be distinguished from the case sub judice in that the *Coolidge* case dealt with seizure and subsequent search of an automobile by police under an invalid search warrant. The

only discussion in that case relevant to this case is that dealing with the seizure of evidence in "plain view" while otherwise legally on the premises. The crucial difference between *Coolidge* and *Green* lies in the fact that there was no search whatsoever by the Federal Agent in *Green*. In *Lustig* the local police entered a room without a search warrant and began rummaging through it. Upon finding counterfeit paraphernalia they called a Federal Agent who was standing by at the local police station, "curious to see what they would find", and who had a prior suspicion that counterfeiting activity was being carried on in that room. The Federal Agent joined the local police and actually took part in continuing the search of the room. The searching ended with the Federal Agent identifying certain objects as counterfeiting paraphernalia and seized the same. The crucial distinction between *Lustig* was illegal from the start having been carried out without a search warrant. In *Green*, however, we have a valid investigation of the cause of a fire by a public official in the line of duty. The Federal Agent only entered the premises and observed this investigation and verified objects found in the course thereof to be counterfeiting paraphernalia. Finally, the case of *Novarro v. U. S.*, 400 F.2d 315 (5th Cir. 1968), can clearly be distinguished from *Green* in that *Novarro* dealt with a "federal search" without a valid search warrant. In *Novarro* the local police having obtained a state search warrant invited Federal Agents to join them and participate in the search of Novarro's home. In fact, however, upon initiating the search of the premises the Federal Agent took command, directed the activities and actively participated in searching the premises. This was clearly a "federal search" without a valid search warrant under Federal Law. As

has already been pointed out in *Green*, there was *no search* whatsoever by the Federal Agent involved. He was merely a passive witness to the continuing investigation of the deputy fire chief and the sole thrust of that investigation was to ascertain the cause of the fire. It should be emphasized that this was not an investigation for arson but merely a routine investigation to determine the cause of the fire in order to prevent any reoccurrence thereof. Thus, there was no search per se by anyone let alone the Federal Agent. From the above it is patently clear that there was no illegal search of Green's apartment for evidence of a crime by either the fire marshal or Agent Varenholt.

The Government concedes that if the Court should hold that the search was illegal, it has no case and that the defendant should be acquitted.

Defendant conceded that the firemen themselves were lawfully on the premises, he does not concede that the fire marshal was on the premises legally without the consent of the defendant.

The Court feels otherwise and finds that the fire marshal, in the course of his duty, was lawfully upon the premises. Defendant argues that the fire marshal, without the permission of the owner, had no right to invite the Secret Service Agent onto the premises, that the Agent was a trespasser and that even though the search was not made by the Agent nor in any wise aided, abetted or encouraged by the Agent, the result in finding of the plates was the result of the "State action" and that the plates introduced into evidence as Government's Exhibit No. 1 were the fruits of an illegal search and seizure. The Court holds to the contrary.

The primary cases in support of the defendant's claim are *See v. City of Seattle*, 387 U.S. 541 (1967) and *Camara v. Municipal Court*, 387 U.S. 523 (1967) which can readily be distinguished from the case in issue here. In both *Camara* and *See* the Courts were dealing with local statutes authorizing routine inspection of premises without a search warrant in connection with the enforcement of health, fire and safety codes. The Court in both *See* and *Camara* required search warrants for such routine inspection. In this case, we are concerned with an inspection of a completely different nature and under completely different circumstances. Herein, the search was by a fire marshall called to the scene of a fire in order to determine the cause of that fire. Ascertaining the cause of the fire was necessary to assure that it was in fact, totally extinguished and would not reoccur. In the course of this investigation, which was part and parcel of the ordinary and necessary actions of the fire department in such a fire emergency, it was incumbent upon the fire marshal to sift the ashes of the box in which it was evident the fire had been concentrated. In performing his duties the fire marshal discovered the contraband and clearly this is not that type of investigation dealt with in *Camara* and *See* and is not subject to the rule of those cases.

Alternatively, defendant argues that no emergency or exigency existed which would have precluded the United States Government from securing a search warrant. Defendant argues that the fire marshal called the Secret Service whose offices are in the United States Court House where offices of the district judges are located as well as the office of the United States Magistrate. He argues that time was not of the essence and that the failure to secure the warrant vitiates the search.

With that conclusion the Court disagrees. When introduced into evidence the plates were contained in a medium sized box which could be easily transported and even hidden by anyone desiring so to do. The facts demonstrate that had the contraband not been taken into custody immediately there was not only a high probability but the almost certainty that the plates would have disappeared forever. This case on its peculiar facts does not fall within the ruling of either the *Lustig* or *Coolidge* case. In this case the Court holds that the fire marshal in the course of his duties was legally upon the premises and until his examination was complete, was in control thereof; that the act of Special Agent Varenholt at his invitation in going on the premises was a lawful act; that since he did not take any part in the search neither aiding, abetting, or encouraging, he could not be charged with any wrongdoing and that the facts surrounding the seized evidence were such as would not make mandatory the securing of the search warrant. The Court therefore finds the defendant GUILTY as charged and directs the Probation Officer to make a presentence investigation. Sentencing will be had at the convenience of counsel during the week of April 17, 1972.

(Signed) THOMAS J. CLARY
Thomas J. Clary, Senior Judge
United States District Court
(Sitting by Special Assignment)